As the recent industry experience discussed above suggests, and as Professors Williamson and Woroch confirm, restoring these incentives to prime time program production will encourage the production of higher quality series that run for longer periods of time.[59] Increased returns to prime time production will also encourage new producers to enter this field. This increased entry and investment, in turn, will benefit the viewing public.[60]

3. The Off-Network Restriction Has Created Perverse Distinctions Between Similar Programs

One of the clearest signs that the off-network restriction is a relic of a previous era is that it results in grossly disparate treatment of similar programs, without any plausible justification or demonstrable viewer benefit. Specifically, because the off-network restriction does not apply to the Fox network, programs that have aired on the Fox network can be aired on ABC, CBS, and NBC affiliates in the Top 50 markets in the access period even though those affiliates cannot, during the same period, air programs that previously ran on their own

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59 Williamson and Woroch at 26.

60 Thus, while the principal effect of the off-network restriction today is to redistribute income among participants in the television industry, eliminating the restriction will have beneficial effects for both economic efficiency and the viewing public. *See* Williamson and Woroch at 23-28. As the D.C. Circuit has recognized, "[i]ncreasing program diversity is a valid regulatory goal . . . and increasing revenues for program originators is a likely means of achieving it." *United Video, Inc. v. FCC,* 890 F.2d 1173, 1181 (D.C. Cir. 1989) (citations omitted). In that case, the D.C. Circuit affirmed the Commission's decision to permit broadcasters to enforce the program exclusivity rights they acquire from program originators. Because of the compulsory copyright license, the Commission had to adopt a regulation (the syndicated exclusivity rule) to achieve this end; but the goal was -- as here -- to permit program producers to earn competitive (and therefore higher) prices for their programming, *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries,* 4 FCC Rcd 2711, 2715 (1989) -- a result that the D.C. Circuit correctly recognized would ultimately enure to the public's benefit.

networks (or for that matter on any of the other major networks). For example, whereas the off-Fox sitcom *Married...With Children* (produced by Columbia) can air on any station during the access period (including the ABC, CBS and NBC affiliates in the Top 50 markets), the off-ABC sitcom *Who's The Boss* (also produced by Columbia) can air only on independent stations and Fox affiliates in the Top 50 markets, but not on ABC, CBS or NBC affiliates.

While this dissimilar treatment confers no plausible benefit on the viewing public, it has a direct and significant financial impact on independent producers. For example, ABC's *Roseanne* (18.2 rating/28 share) collected $1.8 million per episode in syndication in 1992, significantly less than Fox's *Married...With Children* (12.9 rating/20 share) with similar demographics, which earned $2.4 million per episode in 1991. Simply stated, the more popular *Roseanne* was worth 25 percent less than the less popular, but off-Fox, *Married...With Children*. This graphically illustrates the perverse incentives for prime time program production that are created by preserving a regulatory restriction whose time has long since passed.[61]

C. Elimination Of The Off-Network Restriction Will Give Affiliates Greater Choice In Program Selection

The Commission asks how the programming available to viewers -- *i.e.,* program diversity -- would be affected by any change in the behavior of affiliates as a result of

61 We emphasize that the Coalition does not set forth these examples to suggest that Fox affiliates should be shackled by the off-network restriction. Rather, the Coalition strongly believes that the affiliates of ABC, CBS and NBC should likewise be free from the restraints of the off-network restriction.

modification or repeal of PTAR.[62] With respect to the off-network restriction, the answer is that elimination of the restriction will enhance program diversity.

Currently, PTAR restricts network affiliates' ability to choose the programming that they believe will be most attractive to their viewers. Because affiliates in the Top 50 markets are not allowed to air either network or off-network programming during the access period, to the extent that they purchase programming[63] they are basically left with no choice but to purchase first-run syndicated programming for the access period.

Ironically, PTAR was adopted in part to ensure that network affiliates would have greater flexibility to choose the programming they air during the access period. The off-network restriction, however, acts to constrain their choices by placing off-network programming off-limits. Elimination of the off-network restriction will increase the programming choices available to the affiliates by allowing them to purchase first-run or off-network programming (as well as produce their own programs for the access period), and thereby enhance program diversity from the viewers' standpoint.

Applying the lens of economic efficiency to the off-network restriction, Professors Williamson and Woroch reach the same conclusion. They observe that the restriction, by artificially constraining affiliate programming choices, raises the costs

62 NPRM at ¶ 44.

63 Some affiliates air network news -- or, in the Midwest, local news -- during the access period. In the Top 50 markets in November 1994, of the 300 available half-hours in the access period on the three networks (50 affiliates x 3 networks x 2 half-hours), network affiliates programmed 52 half-hours of local news and local programming and 11 half-hours of national news. *See* Figure 8.

associated with acquiring programs for the access period.[64] Moreover, if the restriction is retained, viewers will be prevented from enjoying off-network programming not only on network affiliates but on any station. Many communities in the Top 50 markets have no more than one or two independent viable stations, which is too few to accommodate the potential flow of off-network programming into the access period.[65] Eliminating the off-network restriction, therefore, will lower the cost of programming and enhance the variety of programming available from network affiliates during the access period.

D. Elimination Of The Off-Network Restriction Will Not Threaten The Independent Television Industry

The Commission correctly observes that PTAR has been defended as a means of increasing the diversity of programming outlets -- specifically, by "provid[ing] independent stations with a competitive advantage over competing network affiliates."[66] The Commission further observes that the rationale for bestowing this competitive advantage on independent stations was the perceived need to correct their "inherent competitive disadvantages" stemming from the fact that many such independent stations were UHF stations and thus had much weaker signals.[67] The Commission then appropriately asks whether PTAR is still necessary to protect independent stations and thus ensure outlet diversity.[68]

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64 Williamson and Woroch at 25.

65 *Id.* at 26; see also Figure 6.

66 NPRM at ¶ 45.

67 *Id.*

68 *Id.* at ¶ 46.

The answer with respect to the off-network restriction is unequivocally no. For the reasons discussed below, retention of the off-network restriction is not critical to the viability of independent stations. Thus, contrary to the claims of those stations, elimination of the off-network restriction will not adversely affect outlet diversity.

1. Independent Television Is No Longer In Its Infancy

When PTAR was adopted in 1970, independent television was in its infancy. Thus, the notion of providing independent stations with the "competitive advantage" of the off-network restriction arguably may have been justified at that time. As we explain above, however, after 25 years of government protection, the "infant industry" argument has necessarily lost all force.

In the past quarter century, the independent television industry has grown up. As the Commission noted, in 1970 there were only 82 independent stations. Today there are over 450 -- more than a five-fold increase.[69] In the Top 50 markets alone, there are 289 independent stations.[70]

The coming of age of independent television has, in fact, made the term "independent station" something of an anomaly. Only 21 of the independent stations in the Top 50 markets that purchase syndicated programs[71] are not part of a larger group of

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69 *Id.* at ¶ 16. The current total includes stations now affiliated with Fox, WB and UPN. *Id.* at n.21.

70 *Id.*

71 Of the 289 independent stations in the Top 50 markets, only 120 are viable purchasers of syndicated programming. The remaining stations are religious, home shopping or foreign language stations, or they are marginal stations whose average audience ratings are so low that syndicators do not even sell to them (at least with respect to the most popular first-run syndicated and recent off-
(Footnote 71 Continued)

stations.[72] Moreover, the vast majority of so-called independent television stations are now affiliated with one of the new networks.[73] *Indeed, in the Top 50 markets, there are only seven independent stations that are not either part of a larger group of stations or affiliated with a new network (or both).*

The increasing trend of being part of a station group makes independent stations financially stronger today than in 1970. Moreover, as new network affiliates, independent stations have (in the case of the Fox network) or will (in the case of the WB and UPN networks) become still stronger. At the same time that these stations save on program costs, their ratings, and hence revenues, increase as they air high-quality network programming. Indeed, one need only look at the experience of the independent stations that are now Fox affiliates to see how network affiliation boosted their ability to earn higher advertising revenues. WNOL-TV, for example, an independent station in New Orleans, charged advertisers $25 per 30-second spot on Sunday nights in 1986; the same 30-second spot sold for $900 in 1992, after the station had become a Fox affiliate.[74] More recently, Fox affiliate

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(Footnote 71 Continued)
network programs). These stations are simply not relevant to the debate over PTAR, because they are not competing to purchase either off-network or first-run syndicated fare.

72 Moreover, some of these stations -- like KCAL in Los Angeles -- although not part of a group of stations, are nevertheless owned by a larger corporation.

73 When the non-purchasers of syndicated product are, along with affiliates of the non-traditional networks, subtracted from the total number of independent stations, only 11 truly "independent" stations remain in the Top 50 markets.

74 Stephanie Riegel, *Fox Affiliation Helps WNOL Buck Downturn in Television Advertising,* New Orleans CityBusiness, June 8, 1992 at 6.

KABB-TV, San Antonio, enjoyed a 12 percent ratings increase from its performance just a year earlier, when it was an independent station.[75]

Given these facts, one has to question the accuracy of INTV's prediction that affiliates of the established networks could consistently "outbid independents for the hit off-network programs."[76] Indeed, INTV's own evidence fails to support its claim. INTV claims that an analysis of programs broadcast in markets 51-100 in November 1992 reveals that "several popular off-network hits were shown in prime access more often by affiliates than by independents."[77] INTV's data reveal, however, that out of five off-network hits, independent stations aired two of those programs more often than affiliates of the ABC, CBS and NBC networks.[78]

2. The Majority Of Independent Stations In The Top 50 Markets No Longer Suffer From The "Inherent Competitive Disadvantage" Of Over-the-Air UHF Reception

The past quarter century has brought about another significant development with respect to independent stations. Specifically, the large majority of these stations no longer suffer from the "inherent competitive disadvantage" historically associated with being a UHF station.

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75 *KABB Boosts Fox,* Electronic Media Daily Fax, Feb. 3, 1995 at 1.

76 INTV Reply Comments, July 14, 1994 at 9.

77 *Id.*

78 *Id.*

Largely as a result of recent marketplace changes, a number of independent stations are now -- or shortly will become -- VHF stations. A rash of affiliation changes has resulted in a situation in which, in 17 markets, VHF stations formerly affiliated with one of the established networks have or will become Fox affiliates.[79] Twelve of these markets are Top 50 markets, including three Top 10 markets -- Dallas, Detroit and Atlanta. Prior to these recent affiliation changes, Fox already had 17 VHF station affiliates, 9 of which are in the Top 50 markets.[80] Thus, 21 of the Top 50 markets currently or will soon have Fox affiliated VHF stations not subject to PTAR. An additional 12 of the Top 50 markets have UPN or WB affiliated VHF stations that also are not subject to PTAR.[81]

In the 21 Top 50 markets where Fox has or will have VHF affiliates, the purpose of the off-network restriction -- to assist UHF stations vis-a-vis VHF stations -- has been turned on its head as Fox's VHF affiliates will *not* be subject to the restriction. The results are even more perverse in the eight Top 50 markets in which Fox has recently upgraded to a VHF station and an established network has downgraded to a UHF station.[82] In those markets, not only will VHF stations *not* be subject to the off-network restriction, UHF stations *will* be. *See* Figure 7. Thus, for example, in Detroit, Channel 2 (a Fox affiliate) can air any program it

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79 *See* Julie A. Zier, *Fog of War Engulfs Affiliation Battles,* Broadcasting & Cable, Dec. 5, 1994 at 50 (hereinafter *Affiliation Battles*).

80 Nielsen Station Index, May 1994.

81 *See* Figure 6. This count would be even higher if secondary affiliations were included.

82 For example, in Cleveland, Fox and CBS essentially swapped affiliates. Fox upgraded from WOIO, Channel 19, to WJW, Channel 8, while CBS downgraded from WJW to WOIO. *See Affiliation Battles* at 52.

wishes during the access period, while Channel 62 (a CBS affiliate) cannot air off-network programs.

These perverse results are not likely to be limited to these markets. First, Fox is actively seeking to add additional VHF stations to its affiliate fold. Fox Chairman Rupert Murdoch reportedly "has told his station executives that he wants VHF affiliates in all of the Top 30 markets."[83] Second, in some of the markets in which Fox already has upgraded to a VHF station, an established network is currently without an affiliate. It is not unreasonable to assume that the network will affiliate with a UHF station rather than be without a presence in these markets.[84]

Moreover, even for those independent stations that remain UHF stations, many no longer suffer the "inherent competitive disadvantage" of having a weaker signal due to the advent of cable. In the 63.4 percent of television households that subscribe to cable,[85] there is no difference in quality between a UHF signal and a VHF signal.[86]

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83 John Lippman, *CBS On The Prowl To Replace 8 Stations Lost In Fox Raid,* Los Angeles Times, May 27, 1994 at D4.

84 For example, in New Orleans, current ABC affiliate WVUE-TV is being purchased by a joint venture of which Fox is a partner and will become a Fox affiliate. Lauren Miles, *Atlanta Alignment Settled; Network Television Affiliations,* Mediaweek, Nov. 21, 1994 at 6. ABC has not yet named a new affiliate in that market, but the only currently available viable stations left for ABC to affiliate with are WGNO-TV, Channel 26, and WNOL-TV, Channel 38. *See* Figure 6.

85 Nielsen Television Index, July 1994.

86 To be sure, as the Commission states, approximately 28 percent of television households still rely exclusively on over-the-air broadcast service. NPRM at n.90. The Commission also correctly notes, however, that at least some of those households do so by choice. *Id.* at ¶ 51.

In sum, whatever merit the off-network restriction may have had in 1970, there is no justification for retaining that restriction today. The first-run syndication and independent television businesses can no longer be described as "infant industries" deserving special protection. They have matured and are capable of participating, and thriving, in today's marketplace. Eliminating the off-network restriction, moreover, will serve to promote economic efficiency and program diversity. The time for repeal of the off-network restriction has come.

IV. THE NETWORK RESTRICTION CONTINUES TO SERVE THE PUBLIC INTEREST AND THEREFORE SHOULD BE RETAINED

The Commission adopted the network restriction for the same reasons that it adopted the off-network restriction -- to foster "the development of independent program sources" and encourage "diversity of program ideas . . . by removing the three-network funnel" for the access period.[87] Unlike the off-network restriction, however, the network restriction continues to advance the Commission's diversity objectives and thereby serve the public interest. Thus, notwithstanding the changes in the marketplace since 1970, the network restriction should be retained. While it is possible that additional changes in the television industry may lessen the need for the network restriction in the future, that day has not yet arrived.[88]

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87 *PTAR I* at 395.

88 For example, if the Commission were to allocate the new spectrum that will be gained from digital compression in a manner that results in significant new entrants into the television marketplace, the changes in the marketplace could be significant. (We note this possibility, based on Chairman Hundt's recent remarks, without taking a policy position on it.) At such time, the Commission would, of course, be free to (and, indeed, probably should) review its existing regulations. As Professors (Footnote 88 Continued)

In analyzing whether the network restriction should be repealed, the relevant question is whether, assuming the networks provide programming for the access hour, the public interest will be served. If the networks do not provide programming for the access hour, after all, then preservation of the network restriction will have no arguable adverse impact on the viewing public. Indeed, as Professors Williamson and Woroch explain, if the networks' intent is to allow the affiliates to continue to program the access hour in the absence of the network restriction, then preservation of the network restriction will actually *serve* the public interest.[89] This is because a Commission-imposed restriction *assures* the affiliates that they will have the authority to program the access period, and therefore provides them with the maximum incentives to make the appropriate investments in programming.[90] A "voluntary PTAR," in contrast, would result in weaker incentives, as the affiliates would know that the networks have the freedom to change their minds and provide programming for the hour.[91] This, perhaps, explains NBC's statement in its earlier comments on PTAR that there is "some continued justification for limiting to three hours the amount of prime time programming a top 50 market affiliate can accept from its network pursuant to a network affiliation agreement."[92]

(Footnote 88 Continued)
Williamson and Woroch caution, however, further review of the network restriction should not be undertaken so soon or so often as to create perverse investment incentives. Williamson and Woroch at 43.

89 *Id.* at 29-42.

90 *Id.* at 31-35.

91 *Id.*

92 Comments of NBC, June 14, 1994 at 15.

We demonstrate below that if the networks do provide programming for the access hour, the viewing public will be harmed. First, the gains achieved by eliminating the off-network restriction largely will be lost. Second, the net effect of eliminating the network restriction will be to replace more than 600 affiliates with three networks as programming decisionmakers for the one hour per day that currently is reserved for the affiliates, resulting in less diverse programming available to viewers.[93] Finally, preservation of the network restriction is particularly important today, given that the recent trend toward vertical integration in the television industry presents an additional significant threat to program diversity.

A. The Networks Retain The Ability To Force Affiliates To Accept Network Programs

If the network restriction is eliminated and the networks offer programming for the access hour, the affiliates will have little choice but to air such programming. Today, as in 1970, "the nature of networking generally places the network in a more powerful position than any one of its affiliates."[94] As a result, network affiliates face enormous pressure from the network to accept network programming. The force of this pressure is reflected in the extremely high clearance levels enjoyed by the networks. Even today, ABC's, NBC's and

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93 The network restriction applies, on its face, only to the Top 50 markets and, therefore, to 150 affiliates. Nonetheless, if the restriction is eliminated and the networks provide programming for the hour, the effect would reach all the way to the 211th market. Affiliates in markets 51 through 211, which currently decide what programs to air during the access hour, will also be deprived of the choice of program selection.

94 NPRM at ¶ 43.

CBS's programs are cleared in more than 95 percent of the country.[95] Their prime time clearance levels are even higher -- *e.g.*, 98 percent for the 1993-94 season.[96] Indeed, prime time network series are very rarely preempted by a network affiliate on a regular basis in favor of a syndicated program.[97]

Although it is true that the Commission's rules prevent the networks from contractually obligating affiliates to air network programming, the networks are able to put sufficient pressure on affiliates to all but ensure that affiliates do not regularly or frequently preempt their programming. In addition, the networks can structure affiliate compensation in a manner that minimizes preemption.[98]

The Commission asks whether, given recent marketplace developments, it can "assum[e] that the networks lack the power to force their affiliates to make uneconomical programming decisions."[99] The Commission cannot and should not make this assumption. To be sure, a number of former affiliates of established networks have recently become

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95 David Tobenkin, *Nets Want Clearance Bang For Buck; Hope Longer Affiliation Deals Will Translate Into Fewer Schedule Defections,* Broadcasting & Cable, Nov. 7, 1994 at 20 (hereinafter *Nets Want Clearance*).

96 Nielsen Television Index, 1993-94 Season.

97 Very rarely, some affiliates preempt series for other reasons, *e.g.*, "NYPD Blue" was preempted by affiliates that found its nudity and language unsuitable. *See* Larry Bonko, *Blacked-Out 'NYPD' Is Up For 26 Emmys,* The Virginian-Pilot, July 24, 1994 (reporting that ABC affiliate WVEC-TV (Norfolk, Virginia) elected not to air the program due to content concerns).

98 *See* Paul Farhi, *Advertisers, Suitors Zoom in on TV Networks,* Washington Post, Oct. 31, 1994 at A1 (noting that the established networks recently roughly doubled the amount of compensation to their affiliates).

99 NPRM at ¶ 42.

affiliates of the Fox network. It does not necessarily follow, however, as the Commission speculates, that these changes have made it "unlikely that the networks would attempt to force their affiliates to take unpopular programs or programs necessarily different from those the affiliates themselves would choose."[100]

Indeed, in response to the recent affiliation changes, the established networks have begun entering into long-term affiliation agreements -- some as long as ten years.[101] In exchange for the longer term, however, network officials are reportedly expecting even less preemption by affiliates.[102] One network official has been quoted as saying, "[i]f we make a long-term deal with a station, in exchange for stability to the affiliate and a higher compensation level, we expect them to support our clearances in certain dayparts."[103] Prime time is clearly one of those dayparts. An ABC source reportedly said that "[t]he network's primary concern is regarding prime time, with stations asked to maintain their current level of coverage."[104]

The position taken in this proceeding by the network affiliates themselves reveals that the Commission would be wrong to "assum[e] that the networks lack the power to force their affiliates to make uneconomical programming decisions."[105] If the Commission's

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100 *Id.*

101 *See* Diane Mermigas, *A Network of Change: NBC's Robert Wright Navigates New TV Era,* Electronic Media, Oct. 17, 1994 at 1.

102 *See Nets Want Clearance* at 20.

103 *Id.*

104 *Id.* at 21.

105 NPRM at ¶ 42.

assumption were accurate, the network affiliates would presumably favor elimination of the network restriction, as it undeniably restricts the range of programming available to them. The affiliates, however, *oppose* elimination of the network restriction, which they state "continues to protect the ability of local stations to program to the needs and interests of their local communities."[106] The reason, the affiliates explain, is because "the changes in the broader marketplace, though substantial, have not altered the relative balance of power between networks and affiliates."[107] This Coalition includes many network affiliates.[108] Thus, there is every reason to believe that what the network affiliates themselves fear -- that absent the network restriction, the networks will effectively dictate that all four hours of prime time be filled with programming supplied by the networks -- will become reality if the network restriction is repealed, and that program diversity will be reduced as a result.

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106 Network Affiliated Stations Alliance Comments, June 14, 1994 at 3.

107 *Id.* at 2-3.

108 One might argue that the affiliates should be able to contract with the networks to avoid any inefficient results. That is, if the total revenue "pie" available to the networks and the affiliates would be greater if the affiliates program the access hour, the affiliates theoretically should be able to share this "pie" with the networks in such a way as to ensure that the affiliates retain control over programming in this period. As Professors Williamson and Woroch point out, however, contracts that can be designed in theory cannot always be reached in practice. Williamson and Woroch at 37. Here, for example, in the absence of the network restriction, the networks will find it in their interest to "program periods for which the affiliate could actually earn greater net receipts," so long as "the disposition of net receipts varies in favor of the party that originates the programming" -- *i.e.,* the networks. *Id.* at 38. Put simply, the networks will favor a world in which the total pie is smaller so long as they obtain a larger piece.

B. The Benefits Of Lifting The Off-Network Restriction Will Be Undermined If The Networks Are Allowed To Program The Access Hour

One of the principal benefits of lifting the off-network restriction is to restore the "shelf space" for off-network programs that the off-network restriction has artificially constrained. If the network restriction is eliminated, and network programming fills up the newly created shelf space on the Top 50 network affiliates during the former access period, then the benefits from the removal of the off-network restriction would simply vanish.

Moreover, eliminating the network restriction will do more than merely take away the benefits that would result from the removal of the off-network restriction. It will exacerbate the problem by eliminating, as purchasers of off-network programming, those affiliates in markets 51 through 211 that currently purchase off-network programming. With respect to finding shelf space for their programs, independent producers would thus be in an even *worse* position than they are today.

C. The Network Restriction Continues To Serve The Commission's Interest In Promoting Diversity

The Commission correctly notes in the NPRM that one of the agency's goals in adopting the network restriction was to enhance program diversity. As the Commission explains, "[t]he view was that while the network would dictate one program for the access period, the rule would permit the affiliate to choose from a range of choices (*i.e.*, any independently or affiliate produced program)."[109] The Commission asks

109 NPRM at ¶ 40.

whether, in 1995, "regulatory protection for the affiliates against their networks is necessary to ensure that programming choices are made competitively and in a manner that more accurately reflects viewer preferences."[110] The answer is yes.

If, in each Top 50 market, the networks rather than the affiliates decide how to program the access hour, the resulting programming will necessarily be less tailored to local tastes, as the networks offer standardized fare. Affiliates, on the other hand, have the incentive and the ability to program the access hour to best satisfy local tastes. Local affiliates in the Top 50 markets, for example, currently program 52 of the total half-hours available during access in those markets with local news and other local programming. *See* Figure 8. Even in the other access half-hours where affiliates air non-locally produced programming, they air programming that they believe will be most attractive to their local audiences. Currently, for example, affiliates in the Top 50 markets air 18 different non-locally produced programs.[111]

To be sure, in the absence of the network restriction, the networks could attempt to engage in what Professors Williamson and Woroch term "selective intervention" -- that is, they could permit the affiliates to preempt the network feed whenever it was in the collective interest of the networks and the affiliates to do so.[112] As Williamson and Woroch explain, however, selective intervention is extremely difficult to implement in practice. The networks,

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110 *Id.* at ¶ 42.

111 *See* Figure 8.

112 Williamson and Woroch at 32-35.

for example, may choose to prohibit preemption in certain cases where preemption would be in the parties' collective interest simply in order to capture revenue that otherwise would flow to the affiliates. The affiliates, on the other hand, faced with the prospect that the networks might engage in such behavior, will have less incentive to invest in programming that they could broadcast in place of the network feed.[113] The diversity consequences are apparent: elimination of the network restriction will both (1) "impair the incentives" of "producers who were willing to enter and innovate under PTAR," and (2) cause the affiliates to air less diverse programming.[114]

There are two additional reasons why eliminating the network restriction would harm program diversity. First, to the extent that the access period is programmed with shows provided by the networks, particularly with shows produced in-house, diversity will be impaired. It is widely recognized in the television industry that independent producers are most often the source of innovative television programming. As Professors Williamson and Woroch explain, the networks, in contrast, are hierarchical organizations, and, like all such organizations, necessarily experience "incentive disabilities and bureaucratic propensities," the effect of which is to "give rise to added costs within the internal organization" and to "suppres[s] variety. Diversity is squeezed out as a consequence."[115] Thomas Carter, the

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113 *Id.*

114 *Id.* at 34-35.

115 *See id.* at 35.

executive producer of *Equal Justice,* eloquently illustrated this point in testimony before the Commission:

> At 26 years old, appearing in a television show called the "White Shadow" produced by MTM for CBS, I was given the opportunity to direct an episode in the second season. This opportunity came at the behest of my independent producer and much to the dismay of CBS, who had a very conservative policy on hiring new directors at that time. Left to the mercy of CBS' own bureaucratic caution, I would have no doubt been denied my seat in the director's chair. However, because of the FIN/SYN rules, the network did not own and control the program and the producer was able to take the kind of risk that has kept American business vital throughout its history. You see, Bruce Peltro, the independent producer who unfolded my director's chair, was, unlike the network, close enough to talent and production to know my skills and my promise. He also very significantly was part of a competitive creative environment that constantly sought new ideas and new input.
>
> So, I am but one of hundreds of hopefuls that have benefitted from this atmosphere of independent thinking and diversity. I sit here as only a small indication of the waves of men and women, artists and business persons who have been nurtured by the FCC's carefully considered regulation. When I first presented the script for "Equal Justice" to ABC, the executives there were inclined to table the project. It was only after we threatened to take it to another network that it was given a green light for production. If ABC had owned my project, we would not have been able to take that position and my show might never have made it to the screen. Last year I won an Emmy for best director of dramatic series for the same show.[116]

Second, as Professors Williamson and Woroch observe, the television industry has been experiencing a significant trend toward vertical integration.[117] The consequences of

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116 Statement of Thomas Carter, Panel 5, Before the FCC En Banc Hearing on the Financial Interest and Syndication Rule, December 14, 1990, pp. 120-21.

117 *Id.* at 38.

this trend for diversity of programming are especially worrisome. As independent program producers find the number of unintegrated outlets for their products shrinking, the consequence will be foreclosure of unintegrated producers and deterrence of new producers.[118] In either case, program diversity can be harmed "either by reducing the amount of programming available or by suppressing innovative products."[119] As Professors Williamson and Woroch point out, "[e]mpirical evidence confirms that entrants tend to be more °innovative' than established firms. Furthermore, threatened by entry, incumbent firms are spurred on to be more innovative themselves."[120] Accordingly, they conclude, "[i]t is all the more imperative" that the network restriction be "preserved in the interests of program diversity" at this time.[121]

In sum, the network restriction has no demonstrable adverse effect on the viewing public. On the contrary, by ensuring that network affiliates in the Top 50 markets have the ability to decide what programs to broadcast in one of the four prime time evening hours, the restriction enhances broadcast diversity. When the public interest benefits that flow from the restriction are balanced against the absence of any demonstrable costs, retention of the network restriction is plainly warranted.

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118 *Id.* at 40.

119 *Id.* at 41.

120 *Id.*

121 *Id.*

V. CONCLUSION

For all the reasons set forth above, the Commission should eliminate the off-network component of PTAR and retain the network component of the rule.

Respectfully submitted,

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March 7, 1995

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PRODUCERS

Michael Abrams
(Michael Abrams Productions)
David Babcock
(David Babcock Productions)
Warren Bell
(Wesst, Inc.)
Robert L. Boyett
(Miller-Boyett Productions)
Marc Brull
(Mantissa Productions, Inc.)
Stephen J. Cannell
(Stephen J. Cannell Productions)
Susan Harris
(Witt-Thomas-Harris Productions)
Michael Jacobs
Larry Levin
(Rock Island Productions)
MCA Inc.
Thomas L. Miller
(Miller-Boyett Productions)
Fred Silverman
(Fred Silverman Co.)
Tony Thomas
(Witt-Thomas-Harris Productions)
Ehric Van Lowe
(Sweet Lorraine Productions)
Vin DiBona Productions
The Walt Disney Company
Paul Junger Witt
(Witt-Thomas-Harris Productions)
Bob Young

TRADE UNIONS

Screen Actors Guild
Writers Guild of America, east
Writers Guild of America, west

BROADCASTERS

Burnham Broadcast Company

WALA-TV (NBC)	Mobile, AL
WLUK-TV (NBC)	Green Bay, WI
WBAK-TV (ABC)	Bakersfield, CA
KHON-TV (NBC)	Honolulu, HI

Hubbard Broadcasting

KVOA Communications, Inc.

Providence Journal Company

WHAS-TV (ABC)	Louisville, KY
WCNC-TV (NBC)	Charlotte, NC
KMSB-TV (FOX)	Tucson, AZ
KASA-TV (FOX)	Albuquerque/Santa Fe, NM
KING-TV (NBC)	Seattle, WA
KGW-TV (NBC)	Portland, OR
KREM-TV (CBS)	Spokane, WA
KTVB-TV (NBC)	Boise, ID
KHNL-TV (FOX)	Honolulu, HI

Pulitzer Broadcasting Co.

WESH(TV)(NBC)	Daytona Beach/Orlando, FL
KCCI-TV (CBS)	Des Moines, IA
WLKY-TV (CBS)	Louisville, KY
WDSU-TV (NBC)	New Orleans, LA
KETV(TV)(ABC)	Omaha, NE
KOAT-TV (ABC)	Albuquerque, NM
WXII(TV)(NBC)	Greensboro/High Point/Winston-Salem, NC
WGAL(TV)(NBC)	Lancaster, PA
WYFF-TV (NBC)	Greenville/Spartonburg, SC/Asheville, NC

Scripps Howard Broadcasting Co.

KNXV-TV (ABC)	Phoenix, AZ
WFTS(TV) (ABC)	Tampa-St. Petersburg, FL
WPTV(TV)(NBC)	West Palm Beach, FL
WMAR-TV (NBC)	Baltimore, MD
WXYZ-TV (ABC)	Detroit, MI
KSHB-TV (NBC)	Kansas City, KS
WCPO-TV (CBS)	Cincinnati, OH
WEWS(TV)(ABC)	Cleveland, OH
KJRH(TV)(NBC)	Tulsa, OK

Figure 1

Average Local Advertising Revenues for Selected Syndicated Shows in the Top 75 Markets; Six Months ending October 1994

First-Run

	($000)
1. Wheel of Fortune NSS Rating/Share: 16.2/26	
1-50	$1,669.4
51-75	582.9
2. Entertainment Tonight NSS Rating/Share: 9.1/15	
1-50	$1,555.4
51-75	419.2
3. Jeopardy NSS Rating/Share: 13.4/24	
1-50	$1,427.1
51-75	403.1
4. A Current Affair NSS Rating/Share: 5.3/13	
1-50	$856.3
51-75	206.3
5. Hard Copy NSS Rating/Share: 6.6/14	
1-50	$755.3
51-75	175.9

Off-Network

	($000)
1. Roseanne NSS Rating/Share: 6.5/12	
1-50	$1,407.3
51-75	472.4
2. Cops NSS Rating/Share: 4.6/9	
1-50	$1,353.5
51-75	337.1
3. Cheers NSS Rating/Share: 4.8/11	
1-50	$1,264.9
51-75	317.6
4. Married...With Children NSS Rating/Share: 5.0/11	
1-50	$1,149.6
51-75	216.0
5. The Cosby Show NSS Rating/Share 4.0/9	
1-50	$955.9
51-75	215.4
6. Coach NSS Rating/Share: 4.4/9	
1-50	$405.5
51-75	169.2
7. The Simpsons NSS Rating/Share: 7.2/12	
1-50	$302.6
51-75	63.8
8. Fresh Prince NSS Rating/Share: 5.3/10	
1-50	$297.1
51-75	71.6

Source: What the Stations Take, Mediaweek at 36-39 (Jan. 23, 1995).